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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1216

CHARLES ADJMI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 208 So.2d 859 (Fla. 3rd D.C.A. 1968). Order denying Petition for Rehearing was entered on May 1, 1968, said order is annexed hereto as Exhibit A.

The Supreme Court of Florida denied Petition for Writ of Certiorari on September 30, 1968. A copy is annexed as Exhibit B.

The decision of the Supreme Court of Florida is reported at 218 So.2d 163 (Fla. 1968). Petition for Rehearing was denied on October 31, 1968. Motion to stay Mandate was denied by the Supreme Court of Florida on November 13, 1968.

Application for stay was denied by Mr. Justice Black on December 4, 1968, and Renewed Application for stay was denied by him on December 28, 1968.

Application for Extension of Time in which to file Petition for Writ of Certiorari was granted by Mr. Justice Fortas extending the time for filing to and including March 30, 1969.

The defendant was adjudicated guilty of larceny and sentenced by the Criminal Court of Record In and For Dade County, Florida, on October 6, 1966 to five years imprisonment.

Opinions of Florida Courts rendered in proceedings prior to the second trial are reported at 139 So.2d 179 (Fla. 1962), 170 So.2d 340 (Fla. 3rd D.C.A. 1964); 182 So.2d 242 (Fla. 1966).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The respondent respectfully rephrases the first question presented by the petitioner to read as follows:

I

WHEN A CONVICTION IS REVERSED FOR A NEW TRIAL BASED UPON FAILURE OF THE PROSECUTION TO ELECT A SPECIFIC LARCENY CHARGE, MAY ADDITIONAL CHARGES BE FILED, AFTER THE STATUTE OF LIMITATIONS HAS RUN, WHERE THE SUBSEQUENT CHARGES WERE AMONG THOSE CHARGED IN THE FIRST INFORMATION, AND THE FIRST INFORMATION HAS NOT BEEN QUASHED OR DISMISSED?

II

WHETHER THE UNSOLICITED STATEMENTS, OF A DEFENDANT ACCUSED, MADE TO ANOTHER ARE ADMISSIBLE IN THE DEFENDANTS TRIAL, NOTWITHSTANDING THE FACT THAT THE PARTY TO WHOM THEY WERE MADE IS EMPLOYED BY THE PROSECUTION?

III

WHETHER THE JUDGE MAY REFUSE THE DEFENDANT'S REQUEST TO INSPECT, FOR CROSS EXAMINATION AND IMPEACHMENT PURPOSES, THE TESTIMONY OF A WITNESS TAKEN BEFORE THE STATE'S ATTORNEY IN PREPARATION FOR TRIAL?

REASONS FOR NOT GRANTING THE WRIT

I

THE AMENDED INFORMATIONS

The argument raised by the petitioner clearly is without support in fact, reason, or law. The position taken by the Third District Court of Appeal of Florida is substantially supported by both state and federal law and lack of due process, nor double jeopardy were present in this cause.

Federal authority for the position taken is found in **Morlan v. United States**, 230 F.2d 30 (10th Cir. 1956).

In **Morlan**, supra, the appellant charged that the court had no jurisdiction to try him because there was an information and an indictment to try him. The information issued before the indictment, and charged Morlan with knowingly transporting one Patricia Hyde across state lines for the purpose of prostitution. Morlan was tried, but no verdict was reached. Subsequently an indictment was issued, charging the appellant with transporting one Beth Mounteer across state lines for prostitution.

Morlan protested on grounds that the court had no authority to try him and that the indictment superseded the information and he should not be tried on the information. The 10th Circuit rejected his contention because it was found that both ladies were transported on the same occasion. See also, **United States v. Strewl**, 99 F. Reporter 2d 474 (2nd Cir. 1938).

The argument advanced by the petitioner as regards double jeopardy is equally meritless. The double jeopardy provision of the Constitution does not preclude the government from retrying a defendant whose conviction is set aside because of an error in proceeding leading to conviction. **United States v. Tateo,** 84 S.Ct. 1587; See also **Forman v. United States,** 80 S.Ct. 481.

It is respectfully submitted that the decision below turns upon its own facts, and it will affect few others than the litigants. The appellate courts of Florida properly reached the right decision and nothing in their pronouncement runs afoul the federal standards.

II

THE UNSOLICITED STATEMENTS

The petitioner cites numerous cases for the proposition that he was denied his right to counsel.

The recent trilogy of Supreme Court dcisions which stressed one's right to be represented by counsel, does not include, within its purview, the present factual setting.

Briefly, these cases are; (1) **Massiah v. U.S.,** 377 US 201, 12 L.Ed. 246, 84 S.Ct. 1199 (1964). Therein, the defendant had been indicted, retained counsel, entered a plea of not guilty and was released on bail. Thereafter, a co-defendant, unknown to Massiah, agreed to co-operate with Federal officers in their investigation of Massiah's narcotics activity. He permitted the officers to install a radio transmitter in his automobile whereby the officers would be able to overhear conversations carried on therein.

The co-defendant then conversed with Massiah in the former's automobile. By pre-arrangement and without Massiah's knowledge, a Federal officer listened to said conversation over the aforementioned radio. Massiah made several incriminating statements which were admitted into evidence at his trial.

On these facts, the United States Supreme Court held that Massiah's right to counsel under the Sixth Amendment had been violated . . .

> " . . . [W]hen there was used against him at his trial evidence of his own incriminating works, which Federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." **Massiah v. U.S.**, 377 US at 206, 12 L.Ed. 2d at 250. (emphasis ours)

(2) **Escobedo v. Illinois,** 378 U.S. 478, 12 L.Ed 2d 977, 84 S.Ct. 1758 (1964). Herein the Supreme Court excluded evidence elicited from a defendant once

> "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer and the police have not effectively warned him of his absolute constitutional right to remain silent." 378 US at 490-491, 12 L.Ed.2d at 986.

Florida has chosen to apply **Escobedo** only under the same factual circumstances presented therein. See, also **Montgomery v. State,** 176 So.2d 331 (Fla., 1965).
(3) **Miranda v. Arizona,** 384 U.S. 346, 86 S.Ct. 1602 (1966). This decision may fairly be read as a scathing indictment of police interrogation. The Supreme Court characterized that which it sought to prohibit:

> " . . . incommunicado interrogation of individuals in a police dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." 16 L.Ed.2d at 707.

A synoptic reading of these cases clearly shows that the prohibitions and safeguards were measured for other situations and they are unavailable in the present case where incriminating statements were made in ordinary conversation which had not been instigated for a deliberately interrogative purpose.

The record reveals, from the testimony of John R. Walsh, (a) the appellant sought out the witness and not vice-versa. (R. 273); (b) that the appellant asked the witness to intervene on his behalf with the prosecutrix (R. 277); (c) that the appellant proposed to the witness that he act as an intermediary in a restitution attempt. (R. 277); (d) that the appellant declared, under no interrogation whatsoever, that he would plead guilty and throw himself on the mercy of the court. (R. 279); (e) that the appellant had requested of the witness that he (Walsh) gauge the feelings of Mrs. McAllister, the state and others concerned. (R. 279); (f) that the witness was employed by the State Attorney's Office for a specific

purpose, to-wit; assisting the bank. (R. 281); (g) that the witness was employed by the prosecutrix and her nephew; (h) that the witness held various other jobs while working with the State Attorney (R. 287); (i) that the witness had been approached by the appellant, (R. 288); (j) that the witness had neither asked for nor received any instructions from the State Attorney's Office with respect to the meeting at which the appellant made incriminating statements. (R. 290); (k) that the appellant and his brother knew that the witness was working for the State Attorney's Office. (R. 297); (l) that the witness had been employed by the prosecutrix' nephew, a Philadelphia lawyer, since 1961, as his local agent in the "handling of the several properties and other things that he had administered under a management agreement or trust with Mrs. McAllister." (R. 311); (m) that the witness had been hired as an investigating accountant for the State Attorney's Office. (R. 315-316).

It is not reasonable to say that John R. Walsh was deliberately seeking incriminating evidence from his conversations with the appellant. From the testimony, part of which is shown above, four key facts were adduced and bare repeating:

1. The purpose of his employment with the State Attorney's Office was in connection with the banking records of the appellant and he was under no instructions to elicit any statement from the appellant.

2. The witness was contacted by the appellant, not vice-versa.

3. The witness did not deliberately solicit any incriminating statements, but rather they were volunteered by the appellant, incidental to their relationship which appellant initiated and fostered.

4. Appellant knew the witness was working for the State.

We conclude that the statements made by the appellant to John R. Walsh are admissible as freely given during conversation for other purposes and in no way do they constitute statements drawn from a defendant under interrogation or by deliberate stealth.

Respectfully these statements were given voluntarily and the rights of the petitioner were protected.

III

PRODUCTION OF PRIOR STATEMENTS

Clearly the contentions raised by the petitioner are without merit and the relief sought should be denied by this Honorable Court.

The appellant raised the same issue on appeal in the appellate courts of Florida. The appellate court heard these contentions and found them without merit. The reasoning of the court follows and adequately explains that no federal right was violated:

The courts in Florida have held that the defendant in a criminal case is not entitled to inspection (whether before or during trial) of statements of a prosecution

witness which were taken by a prosecuting officer in preparation for trial, whether or not such statements are sought for the purpose of cross-examination or impeachment. **McAden v. State,** (1945) 155 Fla. 523, 21 So.2d 33 cert. denied 326 U.S. 723, 90 L.Ed. 429, 66 S.Ct. 28.

In **Jackman v. State,** (1962 Fla. App.), 140 So.2d 627, the court rejected the defendant's contention that the trial court committed error in denying his motion to produce statements made to the prosecuting attorney and his investigators by witnesses for the prosecution. The court relied on the rule that a defendant is not entitled to a transcript of statements of prosecution witnesses taken by the prosecution in the course of preparation for trial unless they were taken before a magistrate or are used by the prosecution at trial.

In **Bedami v. State,** (1959 Fla. App.) 112 So.2d 284, it was held that the defendant's application, made during his trial in the criminal court of records of Hillsborough County, for a subpoena duces tecum to compel the production of the stenographic notes and transcription of a statement previously made by a prosecution witness to the county solicitor, was properly denied: The ruling of the trial court was held to be correct notwithstanding the defendant's contention that he had learned independently of possible inconsistencies between the testimony sought for production and that given at trial, that the production and inspection of the statement were essential to administration of justice; and that the defendant might be enabled to properly cross-examine the witness and lay the proper predicate for impeachment of the witness. The court further held that the state-

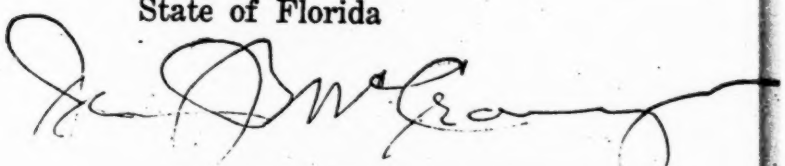
ments of witnesses taken before the solicitor of a criminal court of record, as in the present case, are not official documents, but in effect the work product of the officer. See also, **Mason v. State,** 183 So.2d 236 (Fla. 1966); **State v. Shouse,** (Fla.App. 1965), 177 So.2d 724, 730; **Coco v. State,** (Sup.Ct. 1953), 62 So.2d 892; **Raulerson v. State,** 102 So.2d 281 (Fla. Sup.Ct.); **Williams v. State,** (Sup.Ct. 1940), 197 So. 562; **Ezzell v. State of Florida,** (Fla. Sup.Ct.) 88 So.2d 280; **Urga v. State,** (1958, Fla.App.), 104 So.2d 43; 23 C.J.S. 1157 Section 1036 (1); **Menendez v. United States,** 393 F.2d 312 (5th Cir. 1968).

CONCLUSION

The respondent submits that there was no federal question involved; moreover if this Honorable Court finds that a federal question was presented, the petition for the Writ of Certiorari should be denied since there is no showing of an abridgement of the petitioner's constitutional rights.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General
State of Florida

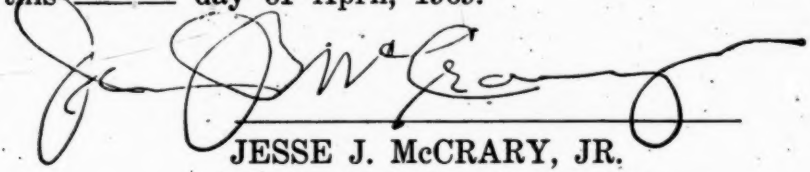


JESSE J. McCRARY, JR.
Assistant Attorney General
State of Florida

AFFIDAVIT OF SERVICE

I, JESSE J. McCRARY, JR., Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that three copies of Brief for the Respondent to the Supreme Court of the United States was served upon HONORABLE MILTON E. GRUSMARK, Attorney for Petitioner, 1674 Meridian Avenue, Suite 311, Miami Beach, Florida 33139, by mailing the copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this ____ day of April, 1969.



JESSE J. McCRARY, JR.
Assistant Attorney General

SWORN TO AND SUBSCRIBED before me at Miami, Dade County, Florida, this _____ day of April, 1969.

_____
NOTARY PUBLIC
State of Florida

My Commission Expires:

APPENDIX I

(TITLE OMITTED)

Case No. 66-873

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.
A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk, District Court of
Appeal, Third District

Signature illegible
Chief Judicial Clerk

cc: Podhurst & Orseck
Jesse J. McCrary, Jr.
H. I. Fischbach
J. F. McCracken

(The Mandate in the above styled cause has today been issued and mailed to the Clerk of the Criminal Court of Record for Dade County, Florida)

(Exhibit A)

APPENDIX II

(TITLE OMITTED)

Case No. 37,417

DISTRICT COURT OF APPEAL, THIRD DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

TEST:
Sid J. White
Clerk, Supreme Court.

cc: Honorable William P. Carter
Honorable J. F. McCracken
Honorable H. I. Fischbach
Honorable Jesse J. McCrary, Jr.

(Exhibit B)